No. 1121

IN THE

Supreme Court of the United States

IN THE MATTER

of

CHILDS COMPANY,

Debtor.

In Proceedings for Reorganization under Chapter X of the Bankruptcy Act—No. 82,868.

JOHN F. X. FINN, as Trustee of Childs Company,

Petitioner,

against

THE 415 FIFTH AVENUE COMPANY, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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Cases Cited.

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Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit is officially reported in 146 Fed. (2d) 592 (R. 302). The opinion of the District Court (R. 288-292) has not been reported.

I.

Supplementary Statement of Facts.

The petition and supporting brief omit certain facts which will be briefly stated and which are considered essen-

tial to an understanding of the questions involved. The testimony in relation thereto is uncontradicted, with one exception, to which attention will be called.

The original lease provided for a net rental of $49,000 per year. To assist the Debtor in its efforts to prevent a bankruptcy or reorganization, Petitioner entered into an agreement with the Debtor on May 1, 1941, reducing the net rent to a fixed minimum of $36,000 per year, plus approximately 6% of the Debtor's yearly sales in excess of $564,280. The agreement provided it should be void if a petition for reorganization should be filed by the Debtor on or before April 30, 1944. Such petition was filed on August 26, 1943.

On December 6, 1943 there was a meeting between Lowell Birrell and Herbert Birrell, the Respondent's attorneys, and Joseph Lorenz, Petitioner's attorney, at which negotiations were commenced for the continuation of the lease. Lowell Birrell urged that Petitioner assume the lease as modified by the agreement of May 1, 1941 (R. 185, 190). This offer was rejected by Mr. Lorenz (R. 190, 191). Lowell Birrell warned him that the best the trustee could hope for was to secure the premises on the terms of the lease as so modified (R. 74) and that Respondent would canvass the market, believing that it could get a new tenant at the modified rent or better. Mr. Lorenz stated that if a new tenant were found he thought the trustee would vacate the premises and that some arrangement could be made for the sale of the Debtor's equipment and fixtures to the new tenant (R. 75).

On January 27th, 1944 Lowell M. Birrell telephoned Mr. Lorenz that Respondent's directors were about to hold a meeting and requested Petitioner's best proposition "so that we might have them together with the other propositions that we might have for the meeting"; that Respondent

had canvassed the market and found the property worth more than Respondent considered it (R. 69, 70). According to Mr. Lorenz' testimony Mr. Birrell told him that Petitioner must make an immediate decision or get out (R. 191, 192).

An appointment was made for a conference on the following day with Mr. Lorenz. Unable to attend himself, Lowell M. Birrell instructed Herbert Birrell to attend for two purposes only.

> First, to make some arrangements for payment on account of use and occupation, and second, to get Petitioner's answer to the Respondent's offer (R. 134).

At this meeting satisfactory arrangements as to use and occupation payments were made. Mr. Lorenz then advised Mr. Birrell that the only lease Petitioner would consider would be one with a small minimum rent plus an increased percentage of sales (R. 135). Thus for the second time Respondent's offer was rejected, although Mr. Lorenz had been authorized by Petitioner to accept it—an important fact which Mr. Lorenz failed to disclose to Mr. Birrell (R. 135, 198).

This meeting was followed by telephone conversations between Herbert Birrell and Mr. Lorenz on January 31, February 2, and February 7, 1944, during which, according to Mr. Lorenz' testimony, Mr. Birrell stated that the desirability of a percentage lease would depend largely upon the management of the Childs Company, which could not be known until it was known who was going to manage the company upon reorganization. Mr. Lorenz further testified that Mr. Birrell had also stated that in any event there was not need to hurry and that it would be preferable to wait until the reorganization proceeding was further along (R.

120, 121), this testimony being emphatically contradicted by Mr. Birrell (R. 139, 141), who testified that he had not said there was no need to hurry or that the matter could await further reorganization developments but that he had told Mr. Lorenz the percentage proposal was a poor one for the very reason that the kind of management would not be known until the Debtor emerged from reorganization (R. 135).

The Master found as a fact (Finding 15, R. 274, 275) that Mr. Birrell had made substantially the statement attributed to him.

Mr. Lorenz testified that this statement lulled him into a feeling of security (R. 196-198) with the result that he took no further action toward assuming the lease while waiting for a response to his proposition for a percentage lease. In this connection the Master found (Finding 13, R. 274):

> "13 The trustee and his attorney believed that between January 28, 1944 and March 22, 1944, the petitioner would be willing to consider a proposition for a lease to be agreed upon, and also believed that the petitioner was not communicating with the trustee or his attorney until the reorganization proceeding should be further advanced, but such belief was not induced by any representation made or implied by the petitioner, or by the petitioner's attorney."

The Master, in his opinion, also stated:

> "I find that this statement by Herbert Birrell over the telephone on January 31, February 2, and February 7, 1944, was merely a continuation of an expression of his own opinion as to the merits or demerits of a lease with a small rental and a large gross rental, and that he did not intend or did not represent that his clients had said or that his clients had authorized him to say that nothing need be done until we see what the new management will be."

On March 23, 1944 there was another meeting between Mr. Lorenz and the Birrells. In the meantime, Respondent had been negotiating with other prospective tenants. Its directors on March 20, 1944, had held a meeting at which it was decided to terminate the Debtor's lease. At the March 23rd meeting Lowell Birrell informed Mr. Lorenz that Respondent wanted possession of the premises and requested that Petitioner vacate. Mr. Lorenz refused, stating that the operations were profitable and that Respondent by its delay had waived its right to terminate (R. 76, 121, 122). The Master found that the March 23rd conversation put the Petitioner on notice that Respondent intended to cancel the lease (R. 280).

About six weeks later, on May 9th, 1944, Petitioner's attorney advised Lowell Birrell by letter that it would assume the lease as modified (Exhibit N, R. 268). This was a belated attempt to accept an offer which had twice been rejected and was no longer open for acceptance. On May 31, 1944 Respondent received Petitioner's check for all rent which would have been payable under the lease as modified. This check was returned with a letter stating that its acceptance might prejudice Respondent's rights.

On May 26, 1944 Respondent leased the premises for a long term to a new tenant. Subsequently, in a telephone conversation on June 1, 1944 and in personal conferences on June 14th and 16th, 1944 between Mr. Lorenz and Lowell Birrell, there was discussion of the possibility of inducing the new tenant to surrender. This proved impracticable and on June 23, 1944, Respondent formally notified Petitioner and the Debtor of its election to terminate the lease and demanded possession of the premises (Exhibit 1, R. 235).

II.

The Petition Fails to State Facts Sufficient to Justify Granting the Writ.

However broad the power of this Court may be to review decisions of the Circuit Court of Appeals, its exercise is restricted in practice to cases where there are special and important reasons therefor (Rule XXXVIII). The jurisdiction to bring up cases by certiorari was given to secure uniformity of decision between the circuits and to bring up cases of importance which it is in the public interest to have decided by this Court, but not to give the defeated party another hearing (*Magnum Co.* v. *Coty*, 262 U. S. 159, 163; *Ruhlin* v. *N. Y. Life Ins. Co.*, 304 U. S. 202, 206). Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it (*General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178).

Any review in this case would be confined largely, if not entirely, to the consideration of questions of fact. Did the landlord misrepresent its intentions? Did the trustee rely thereon? Was he misled thereby? If so, did he suffer any detriment creating an estoppel? Under all the circumstances, was there unreasonable delay by Respondent in exercising its right to terminate the lease? The Master, the District Court and the Circuit Court of Appeals have concurred in findings of fact in favor of Respondent on these issues. Such findings, unless plainly without support, could not be disturbed (*General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178).

The general law of waiver and estoppel is well settled and needs no clarification. Nothing would be accomplished by a further review except approval or disapproval by this Court of conclusions of the lower Court with respect to its application to the facts and circumstances of this case. Such a determination would furnish little guidance in applying

the well known rules of waiver and estoppel generally. Each case involving this branch of the law would still have to be decided primarily by the solution of factual questions. The petition fails to present a situation requiring the clarification of doubtful or unsettled questions of law which are of such general importance or gravity as to merit the time and attention of this Court and justify the delay and expense incident to another appeal.

There is no merit in Petitioner's contention that a fundamental question of law of general importance is involved because the lower Court's decision might embarrass reorganization trustees who find themselves in the same position as Petitioner. There is no reason why such a trustee should be given any greater latitude than any individual tenant under a lease giving the landlord a right of cancellation. In each instance the timeliness of the exercise of the right, the existence of facts which would create an estoppel, and similar matters, would depend upon the particular circumstances and questions of fact, the determination of which would have to be left to the Trial Court.

Any disturbance of the lower Court's decision would embarrass rather rather than simplify any reorganization in which a landlord's right of termination presented a problem to the trustee. If it should be held in this case that Petitioner, by postponing action while negotiations were in progress, had lost its right to terminate, it would be a warning to any other landlord similarly situated to beware of negotiating at all. Any such landlord would probably lose no time in exercising his termination right. He might then negotiate, but would do so with hesitancy and caution. The effect would be to impede and not facilitate the reorganization.

III.

Respondent's Right to Terminate the Lease Has Not Been Lost by Delay or by Estoppel.

Respondent's right of cancellation was a continuing right, which could not be lost or impaired by the mere lapse of time. In *Model Dairy Co.* v. *Foltis-Fisher, Inc.*, 67 Fed. (2d) 704, a Receiver contended that the landlord's delay in exercising its right to terminate because of the lessee's insolvency, constituted a waiver of the right. In disapproving this contention, the Court said (p. 706):

> "The important question, and, as we have said, that on which the judge based his decision, is as to 'waiver.' That unhappy word has done much to confuse the law, in this, as in other fields. In this situation it may mean either that the right of re-entry is impliedly limited to a prompt exercise; or that it has been abandoned; or that the lessor's conduct has caused the lessee to rely upon it to his detriment. The last generally goes as an 'estoppel'. The books at times do speak of delay as though it alone were enough to end the remedy, but never, so far as we can find, except when discussing the lessee's action in reliance upon it. Catlin v. Wright, 13 Neb. 558, 14 N. W. 530, is perhaps the nearest to a holding; but even there the decision appears to have gone rather on the tenant's continued feeding of the cattle after the original breach had passed. In Kelly v. Varnes, 52 App. Div. 100, 64 N. Y. S. 1040, the tenant though in default for rent, had held over and bound himself for a second year; that was certainly a change of position. The discussion usually covers the gross situation somewhat loosely, and delay is of course a relevant factor in the picture as a whole. But on principle we cannot see why anything short of abandonment or 'estoppel' should put an end to this remedy, any more than to others. It is the tenant

> who is and continues to default; it is not apparent why he should be allowed to avoid his bargain, unless the delay has put him at some disadvantage, which prompt assertion of the remedy would not have caused. We cannot say a priori that the lessee's affairs will be less disrupted by an immediate reentry than after a delay of six months; if receiverships are of any value at all, the creditors should be in better position to protect the estate after the delay, than at the beginning."

In *Shear* v. *Healy*, 208 A. D. 269, a tenant who had the right to terminate a lease of a hotel in the event that any law should be enacted which would interfere with the traffic in liquor at the premises, waited until three years after the enactment of the Volstead law before giving notice of his election to terminate. The Court held that time was not of the essence and that the delay was not unreasonable in the absence of proof of any injury suffered by the landlord.

Considered solely from the standpoint of elapsed time, delay in exercising Respondent's right of cancellation redounded to the Petitioner's benefit. He admits that the restaurant was producing "high current operating profits" (R. 13, 21). The longer Respondent waited, and the longer the Petitioner now can retain possession, the greater the enrichment of the Debtor's estate.

The Petitioner seeks to establish claims that he suffered various injuries, not resulting from any lapse of time but from conduct of the Respondent which created an estoppel through which its right of cancellation has been forfeited.

One such claim is that the rental values of space in Times Square area, from December 6th, 1944 or even earlier, constantly increased. Therefore, it is argued, by luring the Petitioner to hope that the lease could be renewed on terms more favorable than those specified in the modifi-

cation agreement and concealing the fact that negotiations with other prospective lessees were pending, Respondent induced the Petitioner to lose his opportunity to lease other space at lower rents than those prevailing when Respondent gave oral notice of its intention to cancel on March 23, 1944 or when formal written notice was given on June 23, 1944.

That argument disregards the important fact that there is no evidence whatever that the Petitioner would under any circumstances or at any time have rented another store, or that any other space suitable for the Debtor's business was ever available. Such a move would have been extremely costly, necessarily involving a large investment of estate funds in a new venture at a new location. It is certainly reasonable to suppose the Petitioner would not have recommended and the Court would not have sanctioned any such risky investment of trust funds. The argument presupposes not only such recommendation and Court approval but a gain to the estate. The danger of loss is overlooked. The Petitioner's attorney was quite right when he informed Respondent's attorney, on December 6th, that the Debtor probably had more restaurants than it needed in that neighborhood (R. 130). The purpose of the reorganization was to rehabilitate existing restaurants, where possible, to abandon them otherwise, but not to launch new enterprises.

Another claim is that Petitioner suffered some detriment in relying on assurances by Herbert Birrell on January 28th that "there was no need to hurry." He was thus lulled into inaction and kept in ignorance of other negotiations until a new lease with another tenant had been consummated. This plea of ignorance seems somewhat naive when considered in the light of the interviews of December 6th and January 27th. On the former date, Mr. Lorenz was warned that the Petitioner's proposal for a further modification

would not be accepted; that the landlord would *canvass the market*. There was discussion as to selling the equipment to a new tenant (R. 75). The telephone message on January 27th was even more emphatic. Mr. Lorenz admits (R. 191, 192) he was then given an ultimatum—"make up your mind or we will do something else." He was then told that Respondent had canvassed the market and had other propositions which its directors were going to consider (R. 69, 70). These explicit warnings were given by Lowell Birrell, who had conducted the leasing negotiations (R. 148). Were they to be disregarded merely because Herbert Birrell, who had been handling matters in connection with payments for use and occupation (R. 148), made the casual remark that there was "no need to hurry?" Whether he made such a statement, as the Master found (14 Finding of Fact, R. 274), or did not make it, as he testified (R. 139, 141), is immaterial. The Petitioner knew, or should have known, that Respondent was negotiationg with others, that rental values were rising, and that he was risking the loss of the property to a higher bidder by prolonging his efforts to drive a better bargain.

In his petition and brief apparently Petitioner proceeds on the assumption that the Master and the Circuit Court of Appeals found that Respondent misrepresented its intentions. On the contrary, the Master found that Mr. Birrell's alleged statement that there was no need for hurry was merely the expression of his own opinion (R. 280) and that it did not mislead petitioner (Finding 13, R. 274). The Circuit Court held that the statement did not create any estoppel (R. 304). There is ~~not~~ the slightest intimation in its opinion that there had been any misrepresentation. It assumes arguendo that the statement was a misrepresentation but only to point out that, even on that assumption (R. 305), the representation was not relevant.

The Petitioner contends in effect, that Mr. Birrell's alleged statement amounted to a promise that Respondent

would keep open for the Petitioner's benefit the prior offer to renew the lease as modified by the agreement of May 1, 1941. This offer had already been twice rejected by Petitioner. Respondent had iterated and reiterated its position —nothing less than the modification agreement would be considered. If, as Petitioner contends, one of Respondent's attorneys undertook to revoke Respondent's positive and repeated rejections of the Petitioner's counter-proposal and obligate Respondent to reconsider its position and again announce its decision, meanwhile holding other negotiations in abeyance, it was high time for Petitioner to inquire about the attorney's authority. Of course, there was no such authority. The Master correctly concluded (Finding 14, R. 274) that Herbert Birrell did not state that he had any such authority.

Petitioner's complaint that he was lulled into inaction prompts an inquiry as to what he would have done if not so lulled. His own subsequent action provides the answer. On May 9, six weeks after March 23 (when he had been told that Respondent demanded possession), he writes the letter announcing his election *to assume the lease as modified*— in other words, accepting the offer of December 6th which he had at least twice rejected. The offer was no longer open. The right of assumption, if any existed, was at most the right to assume the original lease, with the $49,000. rental and all other burdens. This supposed right was not asserted until August 1, after the Master had commenced hearings (R. 123). What he sacrificed, if anything, was not any legal right, but, in the first place, a mere hope that he could get a lease on terms better than those demanded by Respondent, and in the second place, the opportunity to accept an offer which had lapsed through his rejection, though he secretly intended to accept it if he could not get more favorable terms.

Petitioner has urged an elementary principle of law that where a party has two inconsistent rights, he must elect promptly and without waiting, while the other party's position changes, to determine which choice will be the more profitable. The principle invoked has no application to the facts of this case. Respondent had one right, and one right only—the right to terminate the lease because of the lessee's bankruptcy. There was no alternative right to compel Petitioner to assume the lease. Petitioner was given ample opportunity, at least until January 28th, to assume the lease as modified. In thus cooperating with Petitioner, Respondent lost no rights. Petitioner's opportunity was lost through his own fault, in *misleading Respondent* by his attorney's representation that he would not consider any lease except one which provided for a small fixed rent with a higher percentage of sales—a representation made after Petitioner had reached his decision, which was carefully concealed from Respondent and its attorneys, that he would, if necessary, accept the terms of the lease as modified (R. 135, 198). He has no grievance because Respondent took him at his word and sought another tenant after his persistent refusal to assume the obligations of the original lease or of the modification agreement. In doing this, Respondent itself was influenced by, and acted in reliance upon, the Petitioner's conduct and statement of intention.

IV.

The Petition for Certiorari Should Be Denied.

Respectfully submitted,

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THEODORE E. LARSON,
of Counsel.

Dated April 24, 1945.